



March 4, 2011

Ms. Sherrie Kinkle
State Board of Equalization
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Delivered via electronic mail

RE: Confidentiality of Possessory Interests and the Possessory Interests Annual Usage Report (Form BOE-502-P)

Dear Ms. Kinkle:

On behalf of the members of the Pacific Merchant Shipping Association (PMSA), which represents ocean carriers and marine terminal operators conducting business at all of California's public ports, I am writing with comments regarding the BOE staff inquiry regarding information and issues regarding the confidential treatment of possessory interests.

I would also like to thank the staff for its efforts to fully explore this issue through the interested parties process and the BOE Legal Department. We have found that, as in our previous work with BOE staff, the active participation at the December 1st meeting by interested parties allowed everyone to appreciate the issues that are the subject of the conversation at hand. Moreover, the current Legal Department review makes it clear that we are all working off of the same page with regard to the ultimate principle and goal of the legislature and embodied in our state Constitution – that the policy of ensuring that public records are available to all must be held as a paramount principle while administering the law surrounding possessory interests.

As you and your colleagues are well aware, the leasing activities of tenants at California's myriad public port complexes are subject to possessory interest taxation. These activities can range from extremely complex to routinely simple, as the variety of lease relationships at our ports reflects the fact that the nature of business varies dramatically by use, location and the Port complex itself.

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For instance, the Ports of San Diego and San Francisco have a mix of tourist and cruise related tenants, maritime and otherwise, enmeshed with a long history of specialized cargo handling and shipbuilding that still exists today. The Ports of Los Angeles and Long Beach, while representing the fifth largest container port complex in the world and the largest in the United States, actually lease property to a complex mix of terminal operators handling containers, petroleum and automobiles, cruise liners, Catalina ferries and recreational waterfront uses and marinas. And the City of Long Beach operates a Harbor District separate and apart from its Port, which is the well known home to the Queen Mary and another Cruise terminal. The Port of Oakland, a major container port, also maintains 19 miles of commercial waterfront real estate and the Oakland International Airport. In addition, the Ports of Humboldt Bay, Port Hueneme, Redwood City, Richmond, Sacramento and Stockton all have varying degrees of refrigerated cargo, bulk and breakbulk cargo, recreational opportunities, visitor serving infrastructure and rail facilities to serve niche markets not otherwise served by the state's largest ports.

With respect to these activities that directly involve PMSA member companies, there is no one standard for terminal operations or uniform leasing policies at our public ports. Not surprisingly, most lease terms and operating agreements are valued based on the relative supply and demand of the commodity being leased, a subject of intense negotiations between tenants, prospective tenants and landlord ports. These leases, when they involve marine terminal operations, are all negotiated and executed by California's public ports subject to the restrictions and parameters of the federal Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998 (46 USC §40101 et seq.).

The Shipping Act can be used to grant limited immunity from the anti-trust laws of the United States to marine terminal operators so that they may confer with each other and agree upon services, rates, practices and other operational decisions related to the common carriage of goods by water in the foreign commerce of the United States. In order to receive this immunity, however, the parties must file notice with the Federal Maritime Commission (FMC) in the form of a written agreement outlining the topics and actions the parties will be undertaking together. California's public ports are considered marine terminal operators under the Shipping Act and must comply with its requirements.

The manner in which competition can or cannot be limited is of critical importance under the Shipping Act. Specifically, original §1703(b) of the Act (now at §40301(b)), is applied to agreements to the extent the agreements involve ocean transportation in the foreign commerce of the United States "among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers to-- (1) discuss, fix, or regulate rates or other conditions of service; and (2) engage in exclusive, preferential, or cooperative working arrangements."

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While these agreements are subject to limitations and approval by the FMC, the enforcement of the conditions and legal limits placed on agreements falls to competitors. In other words, while the FMC has the authority to pro-actively limit violations of the Shipping Act, notification of such potential violations of the terms of an agreement – or of the fairness of the agreement itself – usually will only come to their attention through a complaint by competitors. Such a claim would lie based on a port having giving an undue or unreasonable prejudice against or disadvantage to a tenant, an unreasonable or undue preference for or advantage to a tenant, or failing to enforce fair and reasonable rules or practices related to the receiving, handling, storing or delivering of property involved in ocean commerce. Nearly all of these types of complaints require fact-specific inquiries into the nature of the agreement itself and its commercial impacts.

Given this federal structure under which our public ports and members operate, negotiate and police themselves, it is particularly important that all public documents regarding all aspects of port pricing and competitiveness, including possessory interest documents and possessory interest tax liabilities, remain public. As you may imagine, without access to public records under the California Public Records Act (PRA) parties would not be able to gather the proper information to make sure that similarly-situated parties pay comparable property taxes and rents on public lands.

The Legal Memorandum reached the correct conclusion in that it found that the documents supporting the Annual Possessory Interest Usage Report are public records. The Board should not act in any way which would further diminish the ability of the public to discover public records from assessors or, by implication, the underlying public agency that created the possessory interest through application of the PRA.

We are concerned by one conclusion which could be drawn from the Legal Memorandum, that an agency could simply label possessory interest information supplied to an assessor as a “change of ownership statement” in order to avoid disclosure. This concern is amplified by our long experience with myriad public agencies which, for whatever reason, are already often less responsive to public records requests than they are otherwise required to be by law. To the extent that the Legal Memorandum identifies a potential loophole through which the ability of the public to get possessory interest records may be curtailed as a result of which form is used when, or because of how or by whom public agencies or assessors communicate with one another, or label such communications, all such loopholes must be closed.

There is no justification for a legal result in which a public record would immediately become confidential simply because it is attached to one type of form or another or because one agency asked for its provision as opposed to it being given without request.

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To come to such a conclusion, it would seem would be to create a specific exemption that is inconsistent with our understanding of the intent and spirit of public disclosure. It is our view that this logic should be further scrutinized and, wherever there is ambiguity, that it be resolved in favor of the PRA. To do otherwise would be to elevate form over function and be a violation of the general policy in favor of public access to public documents. In other words, all disclosures of public records about possessory interests transmitted to them must remain public at all times and when they are in the hands of an assessor they must continue to be disclosed.

Thank you, again, for the opportunity to discuss this issue at the meeting of December 1st and to provide you with these comments regarding the legal memorandum. We look forward to the further discussion of this matter with interested parties.

Please do not hesitate to contact me on this or any other maritime or possessory interest related matters.

Sincerely,



Michael Jacob
Vice President

cc: Members, Board of Equalization
Advocation, Inc.
KP Public Affairs
Shaw/Yoder/Antwih